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HEADQUARTERS EIGHTH ARMY  
United States Army  
Office of the Staff Judge Advocate

Yokohama, Japan  
20 August 1948

UNITED STATES OF AMERICA VS KEIJI NAGAHARA

Review of the Staff Judge Advocate

1. The attached record of trial of Keiji Nagahara at Yokohama, Japan, from 8 March 1948 to 25 March 1948 by a Military Commission appointed by paragraph 6, Special Orders No. 52, Headquarters Eighth Army, dated 5 March 1948, as amended by paragraph 3, Special Orders No. 58, same headquarters, dated 12 March 1948, having been referred to the Staff Judge Advocate, this review thereof is submitted to the Commanding General.

Personal Data Concerning Accused

|                                                                                      |                                        |
|--------------------------------------------------------------------------------------|----------------------------------------|
| NAME: Keiji Nagahara                                                                 | DATE OF CONFINEMENT: 18 December 1947  |
| AGE: 36                                                                              | DATE OF ARRAIGNMENT: 8 March 1948      |
| RESIDENCE: Ima <sup>9</sup> 663, Nojiuma Mura,<br>Shimonikawa Gun, Toyama Prefecture | PLACE OF TRIAL: Yokohama, Japan        |
| MARITAL STATUS: Married                                                              | PERIOD OF TRIAL: 8 to 25 March 1948    |
| RELATIVES: Wife, mother, brother,<br>sister, 1 child                                 | DATE OF SENTENCE: 25 March 1948        |
| EDUCATION: Agriculture School                                                        | SENTENCE: CHL for two (2) years        |
| VOCATION: Farmer                                                                     | CLEMENCY RECOMMENDED BY COMMISSION: No |
| MILITARY CAREER: 8 years Imperial<br>Japanese Army                                   |                                        |

2. Synopsis of Charges, Pleas, Findings, Legal Sufficiency and Sentence:

| <u>Charge and Specifications:</u>                                                                                                                                                                                                                                                      | <u>Pleas</u> | <u>Findings</u>             | <u>Legally Sustained</u> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|-----------------------------|--------------------------|
| Charge: Accused, at the times and places set forth in the specifications, did violate the Laws and Customs of War.                                                                                                                                                                     | NG           | G                           | Yes                      |
| Sp 1: Accused, between 22 June 1945 and 2 September 1945 did willfully and unlawfully mistreat Keith W. Hooper, an Allied PW, and other unidentified sick Allied PWs, by beating and otherwise abusing them.                                                                           | NG           | G                           | Yes                      |
| Sp 2: Accused, between 22 June 1945 and 2 September 1945, did willfully and unlawfully mistreat numerous sick, diseased and ill Allied PWs, by beating and otherwise abusing them.                                                                                                     | NG           | NG<br>(Defense Motion R-47) |                          |
| Sp 3: Accused, between 22 June 1945 and 2 September 1945, did willfully and unlawfully mistreat Lowren A. Arnett, D. W. Barnum, G. L. Simpson, J. L. Harrington, F. Lumpkins, R. W. Zimmer and L. G. Ambos, and other unidentified American PWs by beating and otherwise abusing them. | NG           | G                           | Yes                      |
| Sp 4: Accused, between 22 June 1945 and 2 September 1945, did willfully and unlawfully refuse to give medical aid and hospitalization to sick and ill                                                                                                                                  | NG           | NG<br>(Defense Motion R-47) |                          |

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Allied P's, thereby causing increased suffering, and accentuating their illnesses.

Sp 5: Accused, between 22 June 1945 and 2 September 1945, did unlawfully order and permit reduced and insufficient rations for all sick and diseased Allied P's in the Camp Hospital and in the Camp, thereby causing increased suffering, malnutrition and accentuating their illnesses.

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NG

(Defense Motion R-47)

### 3. Summary of the Evidence:

#### a. For the Prosecution:

As to Specification 1: Between 22 June 1945 and 2 September 1945, the accused made frequent visits to Branch Camp Number 10B, Toyama Prefecture, Nagoya Area, Honshu, Japan (Ex. 1, 2). Upon arrival, the accused went to the camp office, inspected the barracks and then visited the men who were sick in quarters. After ordering all the sick men out, he would strike with his cased saber those remaining who were too sick to move, hitting them on the head and body and also kicking them, causing them to become black and blue (Ex. 1). After this the accused would line up the sick men outside and strike them with his cased saber (Ex. 1, 2, 10). He ordered the sick prisoners back to work and assaulted them causing quite a number of minor injuries (Ex. 6). On one occasion, when a sick prisoner stated he had a sore back the accused kicked him in the back and struck another sick man on the arm who was suffering from boils on the arm (Ex. 5). On another occasion Keith W. Hooper was lying sick in his billet with three or four other sick P.O.'s when the accused entered and struck all of the men with his encased sword and also kicked Hooper in the stomach and other parts of his body (Ex. 3). Among the sick men beaten by the accused were S. N. Hansen, C. W. Atwood (Molle Prosequi, R. 59), S. N. Vance, W. J. Walls, D. A. Benedict, F. Limkins, V. G. Dickson (Ex. 1), L. G. Ambos (Ex. 1, 2), and Keith W. Hooper (Ex. 1, 3). The accused admitted (Ex. 9): that he visited Camp No. 10 two or three times and the camp office five or six times on his own volition; that he carried his saber on these inspection trips; and that he would go to the camp when he had time to instruct Lt. Toda. The prosecution read into the record a part of an affidavit by Tayno Kuranishi appearing in another War Crimes Trial, wherein Kuranishi stated that the accused was ordered to go to 10-B to instruct Lt. Toda (R. 134) while Lt. Toda was the commander of 10-B (R. 135).

As to Specification 3: On several occasions in July and August 1945 the accused visited the docks near the camp where the prisoners from Branch Camp Number 10-B, Toyama Prefecture, Nagoya Area, Honshu, Japan, worked. As the P.O.'s passed the accused would beat them with his encased saber saying in broken English, "Spedo, spedo, faster, faster". Among those beaten on these occasions were Lowren A. Arnett, D. W. Barnum, G. L. Simpson, J. L. Harrington, "J. L. Lumpkind", R. W. Zimmer, L. G. Ambos (Ex. 2). The accused took delight in personally beating and otherwise assaulting P.O.'s (Ex. 8). The accused admitted (Ex. 9) visiting the docks on one occasion with Major Yokor of the P.O. Information Bureau in the War Ministry, but denied any beatings.

b. For the Defense: The accused, after having been duly warned of his rights (R. 109) elected to take the stand and testified under oath as follows:

That he did not know Merritt, whose affidavit supported this specification, until Merritt was present when he was questioned after the war (R. 115). That P.O. Camp No. 6 which he commanded was one mile away from Camp No. 10-B and that the prisoners from Camp No. 6 did not work at the docks with the prisoners from Camp 10-B but worked at the Nomachi Factory and the Fushiki Company about one and one-half miles away from Camp No. 6. That the docks were

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about two miles away (R. 115). That he only went to Camp No. 10-B two or three times except that he stopped at the camp office while waiting for his train (R. 117). The office of Camp No. 10-B was about one hundred feet from the Nomachi Station (R. 118). That the reason that he took the train at the Nomachi Station rather than the Yoshihisa Station which was nearer to Camp No. 6 was because he did not have to transfer if he took the train at the Nomachi Station (R. 118). That until August 22nd when he furnished supplies to Camp No. 10-B which was then self-governed by the prisoners, he had no duties outside of Camp No. 6 (R. 120-121), and that he never beat Hooper or other prisoners at Camp No. 10-B (R. 121). That early in July he asked Lt. Toda to show him the camp (R. 118), but Lt. Toda was unable to do it at that time and had Sgt. Fukujawa show the accused the camp (R. 119). That the accused did this to see if there were facilities that he could use at his camp (R. 119). That he never made any other visits prior to the end of hostilities except to the office when he was waiting for his train (R. 119). That he refused to sign the statement introduced as Exhibit No. 9 because, when it was shown to him on the day after he was questioned, he saw that it was different in three or four places from the way he testified (R. 110). The accused testified as to individual questions and answers and pointed out that the translation was incorrect in that he did not say that he had received orders to visit Camp No. 10-B but merely that he received orders to instruct Lt. Toda (R. 110). That when he was asked if he visited sick prisoners in quarters he answered he may have, and did not say that he remembered visiting them once (R. 112). That when he was asked whether he carried his saber when he visited the sick prisoners in the yard, he did not say yes, but said he didn't carry it in camp but did say he carried it when he went to the dock (R. 112). That he was not asked whether he always carried his saber on these inspection trips (R. 113). That with the corrections he had made Exhibit 9 was correct (R. 132). The defense then withdrew its objection to the admission of Ex. 9 (R. 132).

P. E. Sanders, ranking POW, states that all complaints were made to Lt. Toda and Mr. Oshima and that as far as he knew there were no beatings in this camp (Ex. C). POW Francis stated that no major beatings occurred and that prisoners were treated better than in other camps (Ex. H). POW Kieley stated that men were occasionally beaten by guards but that there were no bad beatings (Ex. I). Kozo Kawa, who acted as an interpreter denied that the happening of the incident mentioned by K. W. Hooper (Ex. 3) who stated that Kozo Kawa had translated an appeal by Yoshido to the accused for increased rations (R. 72).

Lt. Toda, commander of Camp No. 10-B, testified as follows: That prior to the opening of Camp No. 10-B he went to Camp No. 6 for two weeks to receive instructions from the accused as to how to be a branch camp commander (R. 85). After Camp No. 10-B opened the accused had no authority over him (R. 88). The accused did not make official visits to his camp but as Camp No. 10-B was near the railroad station used by the accused he paid several visits to the office (R. 88). He never saw or heard of the accused mistreating anyone in Camp 10-B, or that accused visited the docks where these prisoners worked (R. 88). That the accused looked over the camp once after it opened (R. 90). That when the accused looked over the camp after it opened, he was accompanied by Sergeant Fukujawa (R. 96). That he, Lt. Toda, was in charge of Camp No. 10-B until two or three days after hostilities ceased (R. 91). That the accused when he visited Camp No. 10-B carried a saber as Japanese officers outside of their camp were required to do so (R. 94), but removed it while in the office as it was heavy for the accused who only had one arm, and did not take it with him when he looked over the camp (R. 92, 93).

Mitsuji Otake, the main camp commander of the Nagoya Prisoner of War Camp from June to the end of the war, testified that Camps No. 10-B and No. 6 were under his supervision (R. 98) and that pursuant to his duty he appointed the accused as commander of Camp No. 6 and Lt. Toda as commander of Camp No. 10-B (R. 99). Prior to the opening of Camp No. 10-B, Lt. Toda was sent to Camp No. 6 for one week to receive instructions, and that after that the accused had no authority over Lt. Toda. He further testified that he never heard complaints made concerning the accused's conduct; that the diet of the prisoners of war was fixed by regulations from Tokyo (R. 100) which did not require sick prisoners to receive the same amount of food, although they

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actually did receive the same amount (R. 106). The Japanese regulations required the accused to wear a sword when he left his compound, but that if he made a friendly call at Lt. Toda's camp he would remove his sword in accord with custom (R. 101). The witness further testified that he never authorized the accused to visit Camp 10-B for the purpose of making an inspection. That the accused could be shown around the camp, but would not have the right to insist on being shown the camp (R. 101).

The defense attacked the credibility of POW Merritt, whose affidavit Exhibit 1, was an important part of the prosecution's evidence, submitted in support of this specification. This was done by showing a prior contradictory statement and other contradictory evidence. For example, in Exhibit 1, POW Merritt stated that POW Stuart's leg as a result of an old shrapnel wound became infected and swelled to twice its normal size, and that after a vain appeal to the accused for a doctor to treat him or furnish medical instruments, POW Merritt opened the leg near the ankle with a razor blade and removed over a pint of pus. Robert Barrie, First Lieutenant, Medical Corps, stating his reasons, testified that under these conditions it was possible but highly improbable that this incision would result in the removal of this amount of pus (R. 62, 63). The Japanese medical officer denied that POW Merritt ever asked for surgical instruments. In a prior trial POW Merritt testified (Ex. A) that the accused was present but that his appeal was addressed to Lt. Toda. POW Merritt stated (Ex. 1) that 150 of the 300 prisoners were sick in quarters constantly. This contradicted his testimony given in a prior trial, that no more than ten percent of the prisoners were permitted to remain sick in quarters (Ex. B).

As to Specification 3: The foremen of the work supervisors in the right hand and left hand areas and in charge of work on the ships in the dock area of the Fushiki Land and Sea Corporation where the POWs from Camp No. 10-B worked, all testified that they never saw the accused come into the work area or saw POWs collapse or be beaten (R. 48, 50, 52). The chief of the labor section of this same corporation testified that Lt. Toda was the Camp Commander and that the accused had nothing to do with the prisoners and never gave any orders or instructions concerning these prisoners (R. 54). Another employee of the same corporation who acted as an interpreter from 1 July 1945 until the end of the war testified that he accompanied the prisoners to work, was present while they worked and often accompanied them back to camp. During this time he never saw the accused at the work area and although he saw the accused at the camp office, the accused never gave any orders or instructions. That the complaints made by Sanders, senior POW, were made through him to Lt. Toda, the camp commander (R. 69). Lt. Toda testified that he never saw or heard of the accused mistreating anyone in camp or that he visited the docks where the prisoners worked (R. 88). That the accused when he visited the camp office removed his saber and did not take it with him when he looked over the camp (R. 92-93). The main camp commandant testified that he appointed Lt. Toda as commander of Camp No. 10-B (R. 99) and that after the camp opened the accused had no authority over Lt. Toda (R. 99). That he never heard a complaint concerning the accused's conduct and never authorized the accused to inspect Camp No. 10-B (R. 102). The accused testified that he only visited the docks once in the company of a superior officer from the POW Information Bureau and especially under these circumstances would not, and did not, strike any POWs (R. 122). P. E. Sanders, ranking POW, testified that as far as he knew there were no beatings in this camp (Ex. C). Another POW testified that men were beaten occasionally by the guards but that there were no bad beatings. POW Arnett, on whose affidavit the prosecution relies for proof of this specification, testifying in another case (Ex. C), stated that he was hit several times but not severely beaten and did not identify the accused.

#### 4: Opinion:

There are no errors or irregularities which injuriously affect any substantial rights of the accused. The Commission was legally constituted by proper authority and had jurisdiction over the accused and of the offenses charged. There is no evidence that the accused was not sane at the time of the commission of the alleged acts or at the time of the trial. The accused was ably defended by counsel, cooperated in his own defense, produced witnesses in his own behalf and took the witness stand in his own defense.

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The findings of the Commission are legal and supported by sufficient evidence. Although the credibility of Lonnie C. Merritt, whose affidavit was offered in support of Specification 1, was strongly attacked, there is sufficient corroboration of his statement by one of the victims and other witnesses to fully sustain the finding of guilty. The Commission also could reasonably accept the evidence contained in the affidavits of PWS Arnett and Hansen despite the self-serving statements by the accused and the other Japanese witnesses that there were no beatings at the dock area, and reach its finding of guilty as to Specification 3.

The defense objected to the Commission's jurisdiction to try the accused for offenses against other than American PWs. There is no need to discuss this question in view of many previous decisions upholding the jurisdiction of similar commissions in like cases. (Kaneko & Uchida Docket No. 76; Kato Docket No. 124; Nakajima Docket No. 128).

The defense on the basis of double jeopardy made a special plea for a finding of not guilty on all specifications on the ground that the accused had previously been charged and tried by another military commission for the same offenses in the United States V. Keiji Nagahara, Docket No. 241. Defense counsel pointed out that the specification in Docket No. 241 stated "at or near" Camp No. 6 and that the specification herein states "at or near Branch Camp No. 10B." He also pointed out that these two camps were a mile or less apart and that in the prior trial of the accused evidence was introduced of offenses occurring 2½ miles away, where, the defense alleged, the prisoners of the two camps worked together. The defense counsel further argued that although the prosecution claims that the former charge and specifications were merely intended to try the accused for injuring people of Camp No. 6 and in this case for injuring people in Camp No. 10, the question is not what the prosecution intended but what the accused was previously tried for that counts. The defense counsel also alleged that the prosecution served him with some evidence that was used in the prior trial and asked the Commission to take judicial notice of the record of the former trial (R-6) and later introduced the charges and specifications in the prior trial (Ex. G). The defense pointed out several specifications in the former trial where it claimed the accused was charged with the same offenses as in this trial. In view of the finding of not guilty as to Specification 2, 4 and 5 herein, many of these need not be discussed. Specifications 18, 21 and 26 of the prior trial mentions "beating and otherwise abusing Prisoners of War" and the defense specifically pointed out Specification 26, which reads as follows: "That between 8 September 1944 and 1 September 1945, at or near Nagoya Prisoner of War Camp No. 6, formerly known as Tokyo 21-D Prisoner of War Camp, Takaoka City, Toyama Prefecture, Honshu, Japan, the accused Keiji Nagahara did wilfully and unlawfully mistreat numerous Allied Prisoners of War, other than as hereinabove specified, by beating and otherwise abusing them."

It may be noted that defense counsel was in error in stating that the prisoners from both camps worked at the same place. The record herein establishes, and the accused admits, (R-115) that the prisoners from PW Camp No. 6 did not work at the same place as the prisoners from Branch Camp No. 10B. The accused also testified that the prisoners from PW Camp No. 6 worked at one plant near that camp and another one one and a half miles away; that the docks where the prisoners from Branch Camp No. 10B worked were two miles from PW Camp No. 6 (R-115). It may also be noted that the undersigned, in comparing the records of both trials, did not find a single instance of the prosecution offering evidence in this trial that was used in the prior trial.

It is well settled that, in a plea of former jeopardy or double punishment, it is the evidence, and not the theory of the pleader to which we must look to determine the issue (Murphy V. US 285 Fed 801, 817; certiorari denied 261 US 617). The plea consists of matter of record and matter of fact; of record, the indictment and acquittal; of fact, that the defendant and the offense is the same. Where differences in the indictment make it impossible to say as a matter of law upon the face of the indictment that they relate to the same offense but the generality of the language makes it impossible to say upon the face of the indictment that they do not relate to the same offense, the question is one of fact for the jury, or in this case, for the Commission to

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determine (Short V. US 91 Fed 2d 614, 619-20). In the absence of proof that the former prosecution was for the same offense, the plea cannot be allowed where it does not plainly appear on the face of the record to be identical with the present prosecution (Burton V. US 202 US 344, 380).

As the specifications in the two trials differ on the face in that the locus is placed at or near two separate camps, the question was one of fact for the Commission's consideration. In deciding this factual question the test of the identity of offenses that has commonly applied is whether the facts necessary to conviction under the 2nd indictment would have been sufficient, if proved, to warrant conviction under the first. (Monroe V. US 10 Fed 2d 645, 646; US V. One Buick Coach Automobile 34 Fed 2d 318).

War Crime trials are essentially international in character and the charges and specifications are not, and need not, be framed with the technical precision of common law indictments. (Application of Yamashita 66 S Ct 340, 349). For this reason cases in US courts that are exactly in point are unavailable and the question herein must be considered with a view of deciding whether the Commission complied with the ultimate purpose or *raison d'être* of this doctrine.

The words "at or near" are relative and have different meanings under different circumstances (McDonald V. Wilson, 59 Ind 54, 55). The purpose of an indictment is to apprise the accused of the crime charged against him with such reasonable certainty that he can make his defense and not be taken by surprise by evidence offered at trial and can be protected after judgment against another prosecution for the same offense. (Volpa V. US 86 Fed 2d 35, certiorari denied 299 US 617; 22 Corpus Juris Sec. 999). It must be remembered that, for the most part, the defense, prior to the trial, is given copies of much of the proof that the prosecution intends to introduce and this, in effect, amplifies the details of the specifications and limits their scope.

When the charge and specifications in the first trial are considered with these facts and principles in mind it is apparent that the accused in the prior trial knew with reasonable certainty that he was being charged with offenses involving prisoners from PW Camp No. 6 occurring either in the camp area or at a factory close to the camp or a plant located  $1\frac{1}{2}$  miles away. This is brought out in many specifications charging the accused failed to discharge his duty as commander of this camp and by specification 30 where it was alleged he failed to discharge his duties to Allied PWs by permitting mistreatment of these prisoners by employees of this factory and plant. It is also apparent that the charge and specifications therein would prevent further prosecution for similar offenses committed within the same period of time concerning prisoners in PW Camp No. 6.

Under these circumstances it is plain that the facts necessary to conviction under the charge and specifications herein would not have been sufficient, if proved, to warrant conviction under the charge and specifications in the first trial.

It is therefore concluded that the Commission was not in error when it denied this motion. No opinion is expressed as to the validity of a like plea if it were shown that prisoners from both camps were intermingled and employed at the same work-site.

At the conclusion of the prosecution's case the Commission sustained as to Specifications 2, 4 and 5 the motion by the defense for a finding of not guilty on the ground that the acts and atrocities alleged therein were included in Specification 1 which reads in part: "Mistreat \*\*\* other unidentified Allied Prisoners of War by beating and otherwise abusing them." (R-47) It should be pointed out that, at least as to the validity of the reason given for its decision, the Commission was in error in granting the defense's motion as to Specifications 4 and 5. Specification 4 alleges the accused's wrongful refusal to give medical aid and hospitalization to sick Allied PWs. Specification 5 alleges that the accused did unlawfully order and permit reduced and insufficient rations for such Allied persons. Proof of these allegations would not support a finding of guilty of "beating and otherwise abusing sick Prisoners

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of War" as alleged in Specification 1. A well established maxim of construction in ascertaining the meaning of a written instrument is the rule of ejusdem generis. This rule is explained in 28 Corpus Juris Secundum 1049 as follows: "Where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind, as in the case of a "clean up" phrase, such as the term "otherwise" with respect to a classification which immediately precedes it." (See also Crawford's Statutory Construction 326). Under this rule "otherwise abusing" could only be interpreted to include conduct closely related to beating such as slapping and kicking and could not be interpreted to include the withholding of medical supplies and rations.

The record discloses that no motion asking the disapproval or modification of findings will be filed in behalf of the accused. Request has been made, however, that the accused be allowed credit for part of the accused's previous confinement in Sugamo.

5: Recommendations

It is recommended that the Commission's finding of guilty of the charge and of each specification be approved and affirmed.

The Commission sentenced the accused to confinement at hard labor for two (2) years. This sentence is not excessive and it is recommended that it be approved. In compliance with the established policy, owing to the length of time the accused has spent in confinement prior to the date of sentence, it is recommended that ten (10) months of the confinement at hard labor imposed be remitted. Accused was originally confined 23 December 1945. He was tried and given a one year sentence on 14 October 1947 and released from confinement 23 October 1947. He was again confined 18 December 1947 and sentenced 25 March 1948. Accused prior to the date of this sentence was confined 25 months. Deducting his sentence of one year and taking into consideration the 3 months time of imprisonment before trial in accord with the established policy, the accused should be given credit for a ten (10) month period. Sugamo Prison, Tokyo, Honshu, Japan, is the appropriate place of confinement.

6: Action

Attached hereto is a form of action designed to carry into effect the above recommendations should they meet with your approval.

NORMAN F. CARROLL  
Reviewer  
Judge Advocate Section

I concur in general. However, pre-trial confinement preceding a previous trial should not properly be credited on this sentence. The two confinements were entirely separate and for distinct offenses. Approval of the sentence without reduction is recommended. Proposed action to implement this recommendation is attached.

ALLAN R. BROWNE  
Lt Colonel JAGD  
Army Judge Advocate

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